A

HARVINDER SINGH JOGINDER SINGH v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
NALLINI PATHMANATHAN JCA
B KAMARDIN HASHIM JCA
[CRIMINAL APPEALS NO: J-05(SH)-34-01-2016
& J-05(SH)-36-01-2016]
22 JANUARY 2018

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 ('DDA') – Section 39B(1)(a) – Trafficking in 4,854g of cannabis – Drugs found at footrest of front passenger seat of car – Car belonging to friend of accused – Trial judge found accused had momentary possession of car – Whether accused had knowledge of drugs found in car – Trial judge amended charge to possession under s. 6 of DDA on ground that* D *accused merely had passive possession of drugs – Convicting and sentencing accused to 14 years of imprisonment and ten strokes of rattan – Appeal by accused on conviction and sentence – Appeal by prosecution against amendment of charge – Grounds of appeal – Whether accused had knowledge of drugs found inside car – Whether prosecution succeeded in proving passive possession of drugs – Whether* E *there was affirmative evidence of trafficking*

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs – Accused charged for trafficking in 4,854g of cannabis – Appeal against conviction and sentence by accused – Appeal against amendment of charge to one under possession by prosecution – Grounds of appeal – Whether accused had knowledge of drugs found* F *inside car – Whether prosecution succeeded in proving passive possession of drugs – Whether there was affirmative evidence of trafficking – Dangerous Drugs Act 1952, ss. 6 & 39B(1)(a)*

Acting upon information received relating to a drug trafficking activity, SP8 together with his team conducted a surveillance exercise within the vicinity G of Jalan Jati, Nusa Bestari Jaya, Johor Bahru. At about 8.50pm, SP8 saw a Perodua Viva ('motorcar'). SP8, together with members of his team approached the motorcar and introduced himself as a police officer to the driver of the motorcar. SP8 identified the accused, alone inside the car, as the driver of the said motorcar. SP8 proceeded to investigate inside the H motorcar and found two plastic bags at the footrest of the front passenger seat containing (i) a blue box with the word 'SUSTAGEN' printed on it. Inside this blue box were two slabs of compressed plant materials suspected to be cannabis wrapped in two aluminium foils and transparent plastic packages; and (ii) a cake box with the words 'Mayflower Cake House' printed on it. I Inside this cake box were three slabs of compressed plant materials suspected to be cannabis wrapped in three aluminium foils. SP8 thereafter arrested the accused. The accused told the police that SP4 gave him the motorcar. Subsequently, the accused took the police to SP4's house. The police found

'syabu' at SP4's house and as a result, SP4 was arrested. Upon analyses, the five packages found in the car was confirmed to contain a total of 4,854g of cannabis. The accused was then charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In his defence, the accused contended that as he arrived at SP4's house, SP4 gave him the key to his motorcar and told him to pick-up his friend named 'Scientist'. While on the way to pick up Scientist, the accused saw the two plastic bags at the front passenger footrest of the motorcar when he stopped at the traffic light. The accused denied knowledge of the contents in the plastic bags. The trial judge found that the accused had possession of the said motorcar momentarily *ie*, for only 20 minutes from the time he started to drive the motorcar until he was arrested. Within that time, the accused could not have had the opportunity to examine the contents of the two bags. At the end of the defence case, the trial judge found that the accused was only in passive possession of the said drugs and amended the charge against the accused to one of possession under s. 6 of the DDA, punishable under s. 39A(2) of the same. Accordingly, the accused was sentenced to 14 years of imprisonment and ten strokes of the rattan. Aggrieved by the decision, the accused and the prosecution appealed. The accused's appeal was against his conviction and sentence upon the charge as amended by the trial judge under s. 6/39A(2) of the DDA, on the grounds, *inter alia*, that (i) the trial judge erred in law when he amended the charge at the end of the defence case, instead of at the end of the prosecution's case; (ii) there was no appreciation of the evidence at the close of the prosecution's case; and (iii) the trial judge had failed to consider the version favourable to the accused. Meanwhile, the Public Prosecutor appealed against the said amendment and the eventual conviction and sentence thereunder on the grounds, *inter alia*, that (i) the trial judge was in error when he found that the accused had no knowledge that the two plastic bags inside the motorcar contained the impugned drugs; (ii) the trial judge was in error when he found that the prosecution had only succeeded in proving that the accused was only in passive possession of the said drugs; and (iii) the trial judge was in error when he found that no affirmative evidence of trafficking had been proven without the aid of the presumption or on direct evidence.

Held (allowing Public Prosecutor's appeal; dismissing accused's appeal: setting aside decision of High Court and substituting with conviction under original charge; accused sentenced to death)
Per Ahmadi Asnawi JCA delivering majority judgment of the court:

(1) The trial judge cannot probate and reprobate over his earlier findings of the accused's knowledge in respect of the said drugs. Rather, he should have focused on whether the defence had cast a reasonable doubt in the prosecution's case. Going by his ruling that the accused had no knowledge of the said drugs inside the plastic bags, the proper ruling should be an outright acquittal of the accused of the charge levelled against him and not amending the charge to one of mere possession as one of the ingredient of possession is also the presence of knowledge of the drugs. (para 48)

(2) It was apparent that the accused was solely in control of the motorcar from the time he borrowed the motorcar from SP4 until the time of his arrest by SP8 and his team. By reason of the same, he was thus also having in his custody or control the two plastic bags containing the said drugs placed at the footrest of the front passenger seat. The presence of the two plastic bags inside the motorcar which was under the exclusive control and use by the accused at the material time, must necessarily give rise to a strong inference that the accused had the requisite knowledge that the two plastic bags contained the said drugs. (para 59)

(3) From the evidence of SP4 that the two plastic bags containing the said drugs were not inside the said motorcar when he handed the motorcar over to the accused and that the accused did not bring anything with him when he came to SP4's house except his jacket and helmet, it was reasonable to make a fair inference that the accused had, somewhere along the way after leaving SP4's house, picked the two plastic bags containing the said drugs and placed it at the footrest of the front passenger seat of the motorcar. In such event, he must have known the contents of the two plastic bags. Nonetheless, in the absence of an express admission by the accused, the prosecution was compelled to rely on circumstantial evidence, *ie*, the fact that the accused had physical control of the two plastic bags, to impute knowledge on the part of the accused of the drugs concealed inside the said two plastic bags. In all the circumstances of the case, there was indeed sufficient evidence to make an affirmative finding that the accused had *mens rea* possession of the said drugs. (para 60)

(4) Even if the accused's possession of the said motorcar was only for about 20 minutes, the accused still had all the time in the world to pick up the said drugs along the way before his arrest. Only the accused had the answer where he went to after picking up the motorcar from SP4 up to the time of his arrest by SP8. Therefore, the accused's defence that he had no knowledge of the drugs inside the two plastic bags was woefully indefensible against the entirety of the evidence against him. On the same footing, the trial judge's finding that the accused had no knowledge of the said drugs inside the plastic bags was woefully out of sync with the entire evidence adduced before the court by both sides of the divide. (paras 61 & 62)

(5) The accused's testimony in court that he had called SP4 about the two plastic bags and that SP4 had told him to leave the plastic bags and not to touch them was not stated or mentioned in the accused's cautioned statement. This evidence was very important to link SP4 with the said drugs as was apparently attempted by the accused in his defence and also to show the accused's lack of knowledge of the said drugs inside the two plastic bags. The accused's omission to state such an important event in

his cautioned statement goes into the root of his credibility. It fortified SP4's evidence without more that the two plastic bags containing the said drugs were not inside the motorcar at the material time SP4 handed the motorcar over the accused. (para 63)

(6) It was reasonable and plain common sense to infer that the accused must have known of the existence of the drugs in the two plastic bags and in view of the large quantity and the manner it was packed and concealed, it could reasonably be inferred that the accused was carrying or transporting the same for the purpose of trafficking. Verily, on the facts and evidence, there was no need to even invoke the statutory presumption under s. 37(da) of the DDA to affirmatively find that the accused was trafficking in the said drugs. (para 79)

Per Nallini Pathmanathan (dissenting)

(1) SP4's evidence had to be assessed as a whole. The weight or probative value to be accorded to SP4's evidence should not be inordinate or excessive, given the inconsistencies in his testimony, and the evidence of his wife, in relation to SP4's habits and mental state, which showed that it was unsafe to rely on his evidence alone, to convict the accused of trafficking. (para 104)

(2) The trial judge, who had the audio-visual advantage, after hearing SP4 and the defence case, concluded that it was reasonable for the accused to believe that the plastic bags contained sealed containers of milk powder, and secondly, that the accused was only in momentary or temporary possession of the car as he only drove it for 20 minutes. There was insufficient basis for an appellate court to overturn or reverse this finding of fact, based on the sole consideration that SP4 was not cross-examined on his statement to the effect that plastic bags were not in the vehicle when the keys to the vehicle were given to the accused. Further, there was no evidence that SP4 had inspected the car prior to handing over the keys to the accused. (para 104)

(3) There was no reason for the accused to 'borrow' SP4's car to 'carry' or 'collect' such drugs when he had his own motorcycle and could easily have done so without the use of a car. For this reason, the accused's version of events to the effect that he came to purchase syabu from SP4 and was instructed/directed to fetch 'Scientist' from a designated place, appeared far more plausible and credible. This was clearly the finding/thinking of the trial judge who accepted the defence case to the effect that the accused had no knowledge of the contents of the plastic bags. These matters were sufficient to cast a reasonable doubt on the veracity of the prosecution's case. In other words, it was not beyond reasonable doubt that the accused was a trafficker of the cannabis. In the circumstances, it was unsafe to convict the accused. The accused should, therefore, be acquitted. (paras 104, 105 & 113)

Bahasa Malaysia *Headnotes*

Bertindak atas maklumat yang diterima berkaitan aktiviti pengedaran dadah, SP8 bersama-sama dengan pasukannya mengadakan pengawasan di sekitar Jalan Jati, Nusa Bestari Jaya, Johor Bahru. Pada pukul 8.50 pagi, SP8 melihat sebuah Perodua Viva ('kereta tersebut'). SP8, bersama-sama dengan anggota pasukannya menghampiri kereta tersebut dan memperkenalkan dirinya sebagai pegawai polis kepada pemandu kereta tersebut. SP8 mengenal pasti tertuduh, bersendirian di dalam kereta, sebagai pemandu kereta tesebut. SP8 menyiasat bahagian dalam kereta tersebut dan mendapati dua beg plastik di atas tapak kaki tempat duduk penumpang hadapan yang mengandungi (i) sebuah kotak biru dengan perkataan 'SUSTAGEN' yang dicetak di atasnya. Di dalam kotak biru tersebut terdapat dua ketulan bahan tumbuhan mampat disyaki kanabis yang dibungkus dalam dua keping kerajang aluminium dan paket plastik lut sinar; dan (ii) kotak kek dengan perkataan 'Mayflower Cake House' dicetak di atasnya. Di dalam kotak kek tesebut terdapat tiga kepingan bahan tumbuhan mampat disyaki kanabis yang dibalut dengan tiga keping kerajang aluminium. SP8 kemudiannya menahan tertuduh. Tertuduh memberitahu polis bahawa SP4 telah meminjamkan kereta tersebut kepada tertuduh. Selepas itu, tertuduh membawa polis ke rumah SP4. Polis menemui 'syabu' di rumah SP4 dan akibatnya SP4 ditangkap. Setelah dianalisis, lima bungkusan yang dijumpai dari kereta tersebut disahkan mengandungi kannabis seberat 4,854g. Tertuduh kemudiannya dipertuduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pembelaannya, tertuduh menghujahkan bahawa ketika dia tiba di rumah SP4, SP4 memberinya kunci kereta tersebut dan memberitahunya untuk menjemput rakannya bernama 'Ahli Sains'. Semasa dalam perjalanan untuk mengambil Ahli Sains, tertuduh ternampak kedua-dua beg plastik di tempat duduk penumpang hadapan kereta ketika dia berhenti di lampu isyarat. Tertuduh menafikan mempunyai pengetahuan mengenai kandungan dalam beg plastik tesebut. Hakim perbicaraan mendapati bahawa tertuduh memiliki kereta tersebut seketika iaitu hanya 20 minit dari masa tertuduh mula memandu kereta sehingga dia ditangkap. Dalam masa itu, tertuduh tidak mungkin mempunyai peluang untuk memeriksa kandungan kedua-dua beg tersebut. Di akhir kes pembelaan, hakim perbicaraan mendapati bahawa tertuduh hanya mempunyai milikan pasif terhadap dadah tersebut dan meminda pertuduhan terhadap tertuduh kepada milikan di bawah s. 6 ADB, yang boleh dihukum di bawah s. 39A(2) Akta yang sama. Sehubungan itu, tertuduh dihukum 14 tahun penjara dan sepuluh sebatan rotan. Terkilan dengan keputusan tersebut, tertuduh dan pihak pendakwaan merayu. Rayuan tertuduh adalah terhadap sabitan dan hukumannya atas tuduhan yang dipinda oleh hakim perbicaraan di bawah s. 6/39A(2) ADB, dengan alasan, antara lain, bahawa (i) hakim perbicaraan terkhilaf dari segi undang-undang apabila dia meminda pertuduhan pada akhir kes pembelaan, dan bukan pada akhir kes pendakwaan, (ii) tidak ada pertimbangan terhadap keterangan pada penutupan kes pendakwaan; dan (iii) hakim perbicaraan gagal untuk mempertimbangkan versi yang memihak

kepada tertuduh. Sementara itu, rayuan Pendakwa Raya terhadap pindaan, sabitan dan hukuman adalah berdasarkan alasan, antara lain, bahawa (i) hakim perbicaraan terkhilaf dalam mendapati tertuduh tidak mempunyai pengetahuan mengenai kedua-dua beg plastik di dalam kereta tersebut mengandungi dadah yang dipersoalkan; (ii) hakim perbicaraan terkhilaf apabila mendapati bahawa pihak pendakwaan hanya berjaya membuktikan bahawa tertuduh hanya dalam milikan pasif dadah tersebut; dan (iii) hakim perbicaraan terkhilaf apabila mendapati bahawa tiada bukti afirmatif bahawa pengedaran telah dibuktikan tanpa bantuan anggapan atau keterangan langsung.

Diputuskan (membenarkan rayuan pihak pendakwaan; menolak rayuan tertuduh; mengetepikan keputusan Mahkamah Tinggi dan menggantikan dengan sabitan di bawah pertuduhan asal; tertuduh dihukum mati)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan tidak boleh mengesahkan dan menyangkal penemuan terdahulu tentang pengetahuan tertuduh berkenaan dengan dadah tersebut. Sebaliknya, dia harus memberi tumpuan kepada sama ada pembelaan telah mewujudkan keraguan munasabah dalam kes pendakwaan. Berdasarkan keputusan Hakim Mahkamah Tinggi bahawa tertuduh tidak mempunyai pengetahuan mengenai dadah di dalam beg plastik tersebut, maka keputusan yang sepatutnya haruslah menjadi pembebasan tertuduh secara langsung daripada pertuduhan yang dikenakan terhadapnya dan tidak meminda tuduhan tersebut kepada milikan semata-mata kerana salah satu inti pati milikan juga adalah kewujudan pengetahuan tentang dadah.

(2) Adalah jelas bahawa tertuduh hanya mempunyai kawalan kereta dari masa dia meminjam kereta dari SP4 hingga masa penangkapannya oleh SP8 dan pasukannya. Atas sebab yang sama, dia juga mempunyai dalam jagaannya atau kawalan kedua-dua beg plastik yang mengandungi dadah tersebut yang diletakkan di atas tempat letak kaki tempat duduk penumpang depan. Kehadiran kedua-dua beg plastik di dalam kereta yang berada di bawah kawalan eksklusif dan penggunaan oleh tertuduh pada masa yang material, semestinya menimbulkan kesimpulan yang kuat bahawa tertuduh mempunyai pengetahuan yang diperlukan bahawa kedua-dua beg plastik mengandungi dadah.

(3) Daripada keterangan SP4 bahawa kedua-dua beg plastik yang mengandungi dadah itu tiada di dalam kereta ketika dia menyerahkan kereta tersebut kepada tertuduh dan bahawa tertuduh tidak membawa apa-apa dengannya semasa dia ke rumah SP4 kecuali jaket dan topi keledar, adalah munasabah untuk membuat kesimpulan yang adil bahawa tertuduh telah, di suatu tempat di sepanjang jalan selepas meninggalkan rumah SP4, mengambil kedua-dua beg plastik yang mengandungi dadah tersebut dan meletakkannya di tempat letak kaki tempat duduk penumpang depan. Dalam keadaan sedemikian, tertuduh

pasti mempunyai pengetahuan tentang kandungan dua beg plastik tersebut. Walau bagaimanapun, jika tidak ada pengakuan yang jelas oleh tertuduh, pihak pendakwaan terpaksa bergantung pada keterangan mengikut keadaan, iaitu fakta bahawa tertuduh mempunyai kawalan fizikal kedua-dua beg plastik tersebut, untuk mengaitkan pengetahuan terhadap tertuduh tentang dadah tersembunyi di dalam dua beg plastik tersebut. Dalam semua keadaan kes itu, ada keterangan yang mencukupi untuk membuat penemuan afirmatif bahawa tertuduh mempunyai milikan *mens rea* dadah tersebut.

(4) Walaupun kawalan tertuduh terhadap kereta tersebut hanya selama kira-kira 20 minit, tertuduh masih mempunyai banyak masa untuk mengambil dadah tersebut di sepanjang jalan sebelum penangkapannya. Hanya tertuduh yang mempunyai jawapan ke mana tertuduh pergi selepas mengambil kereta daripada SP4 sehingga masa penangkapannya oleh SP8. Oleh itu, pembelaan tertuduh bahawa dia tidak mempunyai pengetahuan tentang dadah di dalam dua beg plastik tersebut tidak dapat dipertahankan daripada keseluruhan keterangan terhadapnya. Pada masa yang sama, hakim bicara mendapati bahawa tertuduh tidak mengetahui tentang dadah di dalam beg plastik tersebut tidak diselaraskan dengan semua keterangan yang dikemukakan di hadapan mahkamah oleh kedua belah pihak.

(5) Testimoni tertuduh di mahkamah bahawa dia telah memanggil SP4 mengenai kedua-dua beg plastik di tempat letak kaki di tempat duduk penumpang depan dan bahawa SP4 telah memberitahunya untuk meninggalkan beg plastik dan tidak menyentuh mereka tidak dinyatakan atau disebutkan dalam kenyataan beramaran tertuduh. Keterangan ini sangat penting untuk menghubungkan SP4 dengan dadah tersebut seperti yang dicuba oleh tertuduh dalam pembelaannya dan juga menunjukkan kekurangan pengetahuan tertuduh tentang dadah di dalam dua beg plastik tersebut. Ketinggalan tertuduh menyatakan kejadian penting dalam pernyataan beramarannya menjejaskan asas kredibiliti tertuduh. Ia menguatkan keterangan SP4 bahawa kedua-dua beg plastik yang mengandungi dadah tersebut tidak berada di dalam kereta pada masa yang material SP4 menyerahkan kereta tersebut kepada tertuduh.

(6) Adalah munasabah dan wajar untuk menyatakan bahawa tertuduh mesti mempunyai pengetahuan tentang kewujudan dadah-dadah dalam kedua-dua beg plastik dan memandangkan kuantiti yang banyak dan cara ia dibungkus dan disembunyikan, ia boleh secara munasabah disimpulkan bahawa tertuduh telah membawa atau mengangkut yang sama untuk tujuan pengedaran. Sesungguhnya, berdasarkan fakta dan keterangan, tidak ada keperluan untuk mengguna pakai anggapan statutori di bawah s. 37(da) ADB untuk menegaskan bahawa tertuduh sememangnya mengedar dadah tersebut.

Oleh Nallini Pathmanathan (menentang)

(1) Keterangan SP4 perlu dinilai secara menyeluruh. Berat atau nilai probatif yang diberikan kepada keterangan SP4 tidak boleh menjadi terlalu besar atau berlebihan, memandangkan testimoninya tidak konsisten, dan keterangan isterinya, berkaitan dengan tabiat dan keadaan mental SP4, yang menunjukkan bahawa tidak selamat untuk bergantung pada bukti SP4 sahaja, untuk menghukum tertuduh terhadap kesalahan pengedaran.

(2) Hakim bicara, yang mempunyai kelebihan audio-visual, setelah mendengar SP4 dan kes pembelaan, menyimpulkan bahawa adalah wajar bagi tertuduh mempercayai bahawa beg plastik tersebut mengandungi serbuk susu dalam bekas-bekas dikedap, dan kedua, bahawa tertuduh hanya mempunyai milikan sementara kereta atau milikan seketika kereta tersebut kerana tertuduh hanya memandu kereta tersebut selama 20 minit. Tidak terdapat asas yang mencukupi untuk mahkamah rayuan membatalkan atau menterbalikkan penemuan fakta ini, berdasarkan pertimbangan tunggal bahawa SP4 tidak diperiksa balas terhadap kenyataannya bahawa beg plastik tidak berada di dalam kereta tersebut apabila kunci kereta tersebut diberikan kepada tertuduh. Tambahan lagi, tidak ada keterangan bahawa SP4 telah memeriksa kereta tersebut sebelum menyerahkan kunci kepada tertuduh.

(3) Tidak ada alasan bagi tertuduh 'meminjam' kereta SP4 untuk 'membawa' atau 'mengutip' dadah tersebut apabila dia mempunyai motosikal sendiri dan dengan mudah dapat melakukannya tanpa menggunakan kereta. Atas alasan ini, versi tertuduh bahawa dia datang untuk membeli syabu daripada SP4 dan diarahkan/disuruh untuk menjemput 'Ahli Sains' dari tempat yang ditetapkan, kelihatan jauh lebih munasabah dan boleh dipercayai. Ini adalah jelas penemuan/pemikiran hakim bicara yang menerima kes pembelaan bahawa tertuduh tidak mempunyai pengetahuan tentang kandungan beg-beg plastik tersebut. Perkara-perkara ini mencukupi untuk menimbulkan keraguan munasabah mengenai kesahihan kes pendakwaan. Dalam erti kata lain, bukanlah melampui keraguan munasabah bahawa tertuduh adalah pengedar dadah. Dalam keadaan ini, adalah tidak selamat untuk mensabitkan tertuduh. Maka, tertuduh harus dibebaskan.

Case(s) referred to:
Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(refd)***
Basil Omar v. PP [2002] 4 CLJ 418 CA ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Khairuddin Hassan v. PP [2010] 1 CLJ 833 CA ***(refd)***
Megendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP & Another Appeal [1980] 1 LNS 181 PC ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Karim Ab Jabar [2008] 5 CLJ 173 CA ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Roslan Sabu v. PP [2006] 3 CLJ 607 CA ***(refd)***
Saad Ibrahim v. PP [1967] 1 LNS 154 HC ***(refd)***
Sridhar Arunasalam v. PP [2009] 6 CLJ 595 CA ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Taib Mohamad v. PP [2002] 3 CLJ 680 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***
Wjchai Onprom v. PP [2006] 3 CLJ 724 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 12(2), 37(d), (da), 39A(2), 39B(1)(a), (2), First Schedule
Evidence Act 1950, s. 103

For the appellant - Jagjit Singh Bant Singh & Wan Muhd Ariff Ameer Wan Normazlan; M/s Jagjit Ariff & Co
For the respondent - Tetralina Ahmed Fauzi; DPP

[Editor's note: Appeal from High Court, Johor Bahru; Criminal Trial No. 45A-10-04-2014 (varied).]

Reported by Sandra Gabriel

JUDGMENT

Ahmadi Asnawi JCA (Majority):

[1] For the purpose of this judgment, the parties shall be referred to as they were in the High Court at Johor Bahru. Therein, the accused was levelled with the following charge:

> Bahawa kamu pada 25 November 2013 jam lebih kurang 9.00 malam, di tempat letak kereta di tepi Jalan Jati, Nusa Bestari Jaya, dalam daerah Johor Bahru, dalam negeri Johor Darul Takzim, telah didapati mengedar dadah berbahaya jenis cannabis berat bersih 4854 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a), Akta Dadah Berbahaya, 1952, dan boleh dihukum di bawah seksyen 39B(2), Akta yang sama.

[2] At the end of the defence case, the learned trial judge found that the accused was only in passive possession of the said drugs. Consequently, the charge against the accused was amended to one of mere possession under s. 6 of the Dangerous Drugs Act 1952 (hereinafter referred to as the 'DDA') and punishable under s. 39A(2) of the same. Accordingly, the accused was sentenced to 14 years of imprisonment and ten strokes of the rattan.

[3] Aggrieved by the said decision, both the parties embarked upon these appeals. Criminal Appeal No. J-05(SH)-34-01/2016 is the accused's appeal against his conviction and sentence upon the charge as amended by the

learned trial judge under s. 6/39A(2) of the DDA, whereas Criminal Appeal No. J-05(SH)-36-01/2016 is the Public Prosecutor's appeal against the said amendment and the eventual conviction and sentence thereunder.

[4] We allowed the Public Prosecutor's appeal by a majority decision, our learned sister, Justice Nallini Pathmanathan, dissenting, and found the accused guilty of the offence as originally preferred against him under s. 39B(1)(a) of the DDA and accordingly sentenced him to suffer the death penalty under s. 39B(2) of the same. Correspondingly, we dismissed the accused's appeal for want of merit. We now proffer our grounds.

[5] For practical purposes, the issues raised by the parties herein will be handle interchangeably.

The Case For The Prosecution

[6] Acting upon information received relating to a drug trafficking activity, on 25 November 2015, SP8 (Insp. Satisyaselan a/l Balakrishnan) with members of his team of police officers conducted a surveillance exercise within the vicinity of Jalan Jati, Nusa Bestari Jaya, Johor Bahru. He arrived at the scene at about 8.15pm.

[7] At about 8.50pm, SP8 saw a Perodua Viva motorcar bearing the registration number JMQ 4755 passed by where he was and then stopped at the parking lot along Jalan Bestari Jaya, Johor Bahru, as indicated in the charge.

[8] SP8, together with members of his team next approached the said motorcar and introduced himself as a police officer to the driver of the said motorcar. SP8 identified the accused as the driver of the said motorcar. He was alone inside the motorcar.

[9] The accused switched off the motorcar engine and came out of the motorcar as instructed by SP8.

[10] The accused was physically examined. However, nothing incriminating was found upon his person.

[11] SP8 next proceeded to investigate inside of the said motorcar. He found two plastic bags at the footrest of the front passenger seat. SP8 opened the said plastic bags and found:

(i) inside the plastic bag with the printed word 'MASLEE' (exh. P10A) was a blue box with the word 'SUSTAGEN' (exh. P10A(1)) printed on it. Inside this blue box were two slabs of compressed plant materials suspected to be cannabis wrapped in two aluminium foils and transparent plastic packages (exhs. P10A(i) and P10A2(ii) respectively); and

(ii) inside the plastic bag with the printed words 'RED MODANI BY MODANI' (exh. P10B) was a cake box with the words 'MAYFLOWER CAKE HOUSE' printed on it (exh. P10B(1)). Inside

this cake box were three slabs of compressed plant materials suspected to be cannabis wrapped in three aluminium foils (exhs. P10B(i), (ii) and (iii) respectively).

[12] SP8 thereafter effected the arrest of the accused and the seizure of the said incriminating exhibits.

[13] Pursuant to the arrest of the accused, SP8 together with his team, proceeded to raid SP4's house (Paraswaran a/l Balan, also known as Prem) and upon investigation, found 'syabu' in the said house. SP4 was promptly arrested.

[14] SP8 said that he handed the accused and the incriminating exhibits to the investigating officer, SP9 (Insp Siri bin Piuh), soon after the arrest of SP4.

[15] The chemist, SP3 (Liew Chyi), testified that he had analysed the five packages (exhs. P10A1(i), P10A2(ii), P10B(i), (ii) and (iii)) and found it to contain a total of 4,854g of cannabis (hereinafter referred to as 'the said drugs') as defined under s. 2 of the DDA and listed in the First Schedule of the Act. SP3 also prepared a report of her analysis, exh. P13.

[16] The learned trial judge was satisfied that on the facts and evidence, the prosecution had established a *prima facie* case against the accused upon the charge preferred and hence, ordered the accused to enter his defence.

The Case For The Defence

[17] The accused gave evidence on oath.

[18] On 25 November 2013, between 7pm to 7.30pm, he went to Taman Munshi Ibrahim, Tampoi, to visit his friend, Prem (SP4).

[19] He went on a motorcycle with the registration number JPN 658. He did not carry anything with him except his helmet and jacket. Her mother, Jito Kaur a/p Mal Singh (DW2), confirmed the same in her testimony.

[20] He arrived at SP4's house between 8.30pm to 8.40pm. As he was removing his helmet and jacket, SP4 gave him the key to his motorcar and told him to pick-up his friend named 'Scientist' who was then waiting at Desa Bestari Golf Club.

[21] He parked his motorcycle outside SP4's house and left his helmet and jacket on the motorcycle.

[22] He said that the area where the motorcar was parked was a bit dark. He took the motorcar and drove off.

[23] He first noticed the two plastic bags (exh. P10A(1) and P10B(1)) at the front passenger footrest of the motorcar when he stopped at the traffic lights. There was a box in each of the plastic bags but he could not see its contents as they were wrapped.

[24] He called SP4 to ask him about the two plastic bags, wherein SP4 told him to leave the boxes in the motorcar and not to disturb them. A

[25] He thought that the box in one of the bags contained baby milk powder because he saw the words 'SUSTAGEN' printed on the box.

[26] The accused arrived at Desa Bestari Golf Club at about 8.50pm to 9pm. He parked the motorcar next to Hong Leong Bank. He was about to call 'Scientist' when SP8 came and knocked on the front driver's seat window and introduced himself as a police officer. B

[27] He was asked to step out of the car. He told SP8 about 'Scientist' who was around the area and as soon as 'Scientist' appeared at the scene, the police gave chase. However, 'Scientist' managed to escape. C

[28] The police conducted a body search on him and found nothing incriminating upon him.

[29] The police took out the boxes from the two plastic bags and took out a few packages wrapped in aluminium foils and found the contents to be compressed plant materials suspected to be cannabis. D

[30] He disagreed that he was shivering when the police were investigating the contents of the two boxes but admitted that he was shocked when told that the boxes contained cannabis. E

[31] He told the police that SP4 gave him the motorcar. Subsequently, he took the police to SP4's house.

[32] The police found 'syabu' at SP4's house and as a result, SP4 was arrested. F

[33] He reiterated that it was not true that he had borrowed the motorcar at 6.30pm as he was still at his house during that hour.

[34] He said that he arrived at SP4's house between 8.30pm to 8.40pm and was arrested by the police at about 9pm. G

[35] He produced his cautioned statement (exh. D24) in evidence to fortify his defence.

[36] The learned trial judge found that the accused's defence was premised upon the contention that he had no knowledge that the two plastic bags (exhs. P10A and P10B) inside the motorcar contained the impugned drugs. H

[37] The learned trial judge also found that the evidence relating to 'Scientist' and that SP4 had asked the accused not to disturb the bags inside the car were never mentioned in the accused's cautioned statement, D24. However, the accused had mentioned that he saw the two plastic bags at the footrest but did not know the contents of the bags. This is consistent with the accused's evidence in court. I

[38] The trial judge also found that the accused had possession of the said motorcar momentarily ie, for only 20 minutes from the time he started to drive the motorcar until he was arrested. Within that time, the accused could not have had the opportunity to examine the contents of the two bags.

[39] The learned trial judge further found that there was no affirmative evidence that the ingredient of the charge in respect of trafficking had been proved without the aid of presumption or on direct evidence. The defence had succeeded in casting a reasonable doubt upon the prosecution's case on the original charge under s. 39B(1)(a) of the DDA. On the other hand, the learned trial judge found that the prosecution had succeeded in proving an offence of passive possession of cannabis under s. 6 of the same - see p. 33, jilid 1, RR. Hence, the charge was accordingly amended and the accused was convicted of an offence under s.6 and was sentenced under s. 39A(2) of the DDA thereof.

The Appeals Before Us

[40] The Public Prosecutor posited the following grounds:

(i) the learned trial judge was in error when he found that the accused had no knowledge that the two plastic bags (exhs. P10A and P10B) inside the motorcar contained the impugned drugs;

(ii) the learned trial judge was in error when he found that the prosecution had only succeeded in proving that the accused was only in passive possession of the said drugs; and

(iii) the learned trial judge was in error when he found that no affirmative evidence of trafficking had been proven without the aid of the presumption or on direct evidence.

[41] Meanwhile, learned counsel for the accused canvassed the following:

(i) the learned trial judge erred in law when he amended the charge at the end of the defence case, instead of at the end of the prosecution's case;

(ii) there is no record of the accused's conviction or finding of guilt for any offence;

(iii) there is no appreciation of the evidence at the close of the prosecution's case;

(iv) SP4 is not a credible nor a reliable witness; and

(v) the learned trial judge had failed to consider the version favourable to the accused.

Our Decision

[42] We will first deal with the Public Prosecutor's appeal in Criminal Appeal No. J-05(SH)-36-01-2016.

Ground (i) – Knowledge Of The Accused In Respect Of The Said Drugs

[43] At pp. 23 and 24 of jilid 1, rekod rayuan ('RR'), the learned trial judge in his grounds of judgment found that the said drugs were found in the two plastic bags placed at the footrest of the front passenger seat of the motorcar driven by the accused. The accused was alone in the motorcar, and on the facts and evidence as presented by the prosecution, the accused was deemed to have possession and knowledge that the contents of the two plastic bags were dangerous drugs. Hence, the prosecution had succeeded in proving that the accused had possession of the said drugs and on the issue of trafficking, it could rely on the acts of trafficking as defined under s. 2 of the Act, in particular, the acts of transporting and concealing the said drugs inside the car.

[44] However, at the end of the defence case, the learned trial judge found, amongst others, at pp. 32, 33, jilid 1, RR:

> ... The Court had also observed that the period the accused was at SP4's house was between 8.30 p.m. to 8.40 p.m. and he was arrested at about 9.00 p.m. as stated in the charge sheet exhibit P2 which was about 20 minutes after he had driven the motorcar. The evidence that was led by the accused and by the prosecution was that he did not stop anywhere except at the place where he was arrested. Within the 20 minutes that the accused had the motorcar with him, there was no opportunity for the accused to examine the contents in the two boxes P10A and P10B respectively. It could be said that the accused possession of the motorcar was only momentarily i.e. just about 20 minutes before he was arrested. However the incontrovertible facts of the case was that the accused admitted seeing the two plastic bags on the footrest at the front passenger seat of the said motorcar. It was the accused own admission that he saw the two plastic bags at the footrest at the front seat of the said motorcar and thought that they were baby powder milk because he saw the word 'Sustagen' written on one of the boxes. The court was of the view that there was no affirmative evidence that the ingredient of charge in respect of trafficking had been proved by the prosecution without the aid of the presumption or on direct evidence.

[45] Earlier, in response to the accused's testimony that he thought one of the boxes contained baby milk powder as the word 'Sustagen' was printed on it, the learned trial judge opined:

> ... The Court was of the view that it was a reasonable inference to draw after seeing one of the boxes had the word 'Sustagen' written on it that the contents could be powder milk for infant.

[46] Upon these findings by the learned trial judge, the learned Deputy Public Prosecutor ('DPP') submitted that the learned trial judge had found that the accused had no knowledge of the contents of the boxes inside the two plastic bags and that there is no affirmative evidence to prove the ingredient of trafficking in the said drugs without the aid of the presumption or direct evidence. Hence, upon these grounds, the charge against the accused was reduced to one of mere possession.

[47] The learned DPP further submitted that what the learned trial judge did was wrong in law. When assessing the defence, he cannot revisit his earlier findings which formed the basis of calling the accused to enter his defence and substituted it with something else. It was also submitted that the learned trial judge was blowing hot and cold on the issue of the accused's knowledge of the said drugs inside the plastic bags and trafficking in the said drugs. Finally, the learned DPP brought our attention to the following ruling by the Federal Court in *Duis Akim & Ors v. PP* [2013] 9 CLJ 692, at p. 70:

> [38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.
>
> [39] In *PP v. Khong Soh* [1966] 1 LNS 141; [1966] 2 MLJ 137 Macintyre J said this at p. 139:
>
> > Having held that a *prima facie* case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind.
>
> [40] Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focused on whether the defence had cast a reasonable doubt in the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.

[48] We were entirely with the submissions of the learned DPP. As suggested by high authority, the learned trial judge cannot probate and reprobate over his earlier findings of the accused's knowledge in respect of the said drugs. Rather, he should have focused on whether the defence had cast a reasonable doubt in the prosecution's case. Going by his ruling that the accused had no knowledge of the said drugs inside the plastic bags, then the proper ruling should be an outright acquittal of the accused of the charge levelled against him and not amending the charge to one of mere possession as one of the ingredient of possession is also the presence of knowledge of the drugs.

[49] We shall now evaluate the propriety of the learned trial judge's finding in respect of the accused's knowledge relating to the said drugs and the resultant amendment of the charge preferred against the accused.

[50] In respect of the same, SP4 said that at the material time, the motorcar JMQ 4755 was registered under his wife's name, SP6 (Kalarani a/p Palanival). He knew the accused as a friend and he had lent his motorcar to the accused a number of times in the past. The last time he lent his

motorcar to the accused was on 25 November 2013 (the day of the accused's arrest) at about 6.30pm. The accused had asked SP4 to use the said motorcar as the accused had wanted to go out.

[51] SP4 continued that he gave the key to the motorcar to the accused. He further testified that when he handed over the motorcar key to the accused, the two plastic bags marked as P10A and P10B were not inside the motorcar.

[52] SP4 also testified that his wife (SP6) did not use the said motorcar on 25 November 2013.

[53] In cross-examination, SP4 denied that he had asked the accused to pick-up someone by the name of 'Scientist' at the Golf Club. SP4 also said that he handed over the motorcar to the accused at his friend's house, one Balan, at Taman Munshi Abdullah, at about 6.30pm and that when the accused arrive at Balan's house, he had with him only a jacket and a helmet.

[54] SP6 testified that she used the motorcar to ferry her children to school. She said the last time she saw the motorcar was on 25 November 2013. On that date, she did not use the motorcar to ferry her children as it was a school holiday. SP6 disagreed that the drugs found inside the motorcar belonged to her husband (SP4).

[55] According to her recollection of the events on 25 November 2013, SP4 had used the said motorcar at about 5.30pm and had come back at about 6pm and he went out again at about 8pm and returned home at about 8.30pm. After dinner, SP4 went out again and it was only two days later that the police came to tell her that SP4 had been arrested in connection with a drug offence.

[56] The crux of SP4's evidence is that when he handed the said motorcar to the accused, the two plastic bags containing the said drugs were not anywhere inside the motorcar (see p. 50, jilid 1, RR). He said that it was the accused who had wanted to borrow the said motorcar and denied that he had handed the motorcar to the accused and had asked the accused to fetch 'Scientist' using the said motorcar. SP4's testimony in respect of the same was not challenged by the defence. It was also not the prosecution's case that SP4 had called the accused over to his house to run errand for him.

[57] In addition, it was not suggested to SP4 that the drugs found inside the two plastic bags in the motorcar were his or that SP4 had placed the drugs inside the motorcar or that SP4 had wanted to entrap the accused. SP4's evidence was intact and was uncontroverted until the end. More importantly, the learned trial judge did not find SP4 to be an unreliable witness nor a witness unworthy of credit.

[58] In such event, there is no reason to disbelieve SP4's testimony that at the material time of handing the motorcar over to the accused, the said incriminating exhibits were not inside the motorcar. The learned trial judge

apparently had ignored and rejected the most vital part of SP4's testimony. Worst still the learned trial judge did not assign any reason whatsoever for so doing.

[59] It is apparent that the accused was solely in control of the motorcar from the time he borrowed the motorcar from SP4 at about 6.30pm, until the time of his arrest whilst at the driver's seat inside the motorcar at about 9pm by SP8 and his team (according to SP4; or from 8.30pm/8.40pm to 9pm according to the accused). By reason of the same, he was thus also having in his custody or control the two plastic bags containing the said drugs placed at the footrest of the front passenger seat – see *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19; *Khairuddin Hassan v. PP* [2010] 1 CLJ 833; [2010] 6 MLJ 145; and *Aedy Osman v. PP* [2011] 1 CLJ 273. The presence of the two plastic bags inside the motorcar which was under the exclusive control and use by the accused at the material time, must necessarily give rise to a strong inference that the accused had the requisite knowledge that the two plastic bags contained the said drugs. As said by the Federal Court in *PP v. Abdul Rahman Akif (supra)* "…. again knowledge cannot be proved by direct evidence, it can be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite …"

[60] In addition, bearing always the evidence of SP4 that the two plastic bags containing the said drugs were not inside the said motorcar when he handed the motorcar over to the accused and that the accused did not bring anything with him when he came to his house except his jacket and helmet, it is reasonable to make the fair inference that the accused had, somewhere along the way after leaving SP4's house, picked the two plastic bags containing the said drugs and placed it at the footrest of the front passenger seat of the motorcar. In such event, he must have known the contents of the two plastic bags. Nonetheless, in the absence of an express admission by the accused, the prosecution was compelled to rely on circumstantial evidence, ie, the fact that the accused had physical control of the two plastic bags, to impute knowledge on the part of the accused of the drugs concealed inside the said two plastic bags. In all the circumstances of the case, there is indeed sufficient evidence to make an affirmative finding that the accused had *mens rea* possession of the said drugs.

[61] In our view, the accused's defence that he had no knowledge of the drugs inside the two plastic bags is woefully indefensible against the entirety of the evidence stacked against him. On the same footing, we found that the learned trial judge's finding that the accused had no knowledge of the said drugs inside the plastic bags is woefully out of sync with the entire evidence adduced before the court by both sides of the divide.

[62] Even if the accused's possession of the said motorcar was only for about 20 minutes as contended by the defence and picked up by the learned trial judge (from between 8.30pm or 8.40pm when he took the car from SP4

to 9pm when he was arrested by SP8), the accused still has all the time in the world to pick up the said drugs along the way before his arrest. 20 minutes is not a short time though. Only the accused has the answer where he went to after picking up the motorcar from SP4 up to the time of his arrest by SP8. The law does not require SP8 to follow the accused from the moment the accused left SP4's house to make up a case against him. The law neither requires the police witnesses to physically witness the accused picking up the said two plastic bags along his journey to fasten culpability upon him.

[63] In addition, the learned trial judge found that the accused's testimony in court that he had called SP4 about the two plastic bags at the footrest of the front passenger seat and that SP4 had told him to leave the plastic bags and not to touch them was not stated or mentioned in his cautioned statement, exh. D24. Indeed, the said finding by the learned trial judge was correct. In our view, this evidence is very important to link SP4 with the said drugs as was apparently attempted by the accused in his defence and also to show the accused's lack of knowledge of the said drugs inside the two plastic bags. Yet the accused failed to mention the same in his cautioned statement. The accused's omission to state such an important event in his cautioned statement goes into the root of his credibility. There is no excuse for the accused not to mention so in his cautioned statement as the same was the foundation of the crux of his defence. It fortified SP4's evidence without more that the two plastic bags containing the said drugs were not inside the motorcar at the material time he handed the motorcar over the accused.

[64] Now, learned counsel complained that SP4 is not a credible witness on the grounds that SP4 had contradicted himself when he said that there was nothing inside the motorcar at the material time he gave the motorcar key to the accused but at the same time said that he did not see the accused carrying anything except for his jacket and helmet when he came to Balan's house to borrow his motorcar. We asked ourselves in what manner would these two statements contradict each other. We found none. We opined that PW4 was merely narrating what he saw and knew factually when he handed the motorcar to the accused.

[65] Learned counsel also submitted that SP4's testimony that he handed the motorcar to the accused at 6.30pm was contradicted by SP6 (his wife) when SP6 said that up to 8.30pm SP4 was still at home having dinner. In addition, SP6 also testified that the accused took the motorcar at about 8.40pm. Learned counsel further submitted that there were also contradictions in respect of the motorcar alarm system amongst these witnesses.

[66] We agreed that there were contradictions in respect of the issues enumerated by learned counsel above. However, we were of the view that the said contradictions were minor and inconsequential on account that it did not detract the fact that the accused had indeed borrowed the said motorcar

from SP4. It is also of no consequence in the light of SP4's uncontroverted testimony that at the time he handed the motorcar over to the accused, the two plastic bags containing the said drugs were not inside the motorcar. Further, it was not suggested to SP4 that the said drugs were his or that the said drugs were placed inside the motorcar by him or that SP4 had entrapped the accused.

[67] Learned counsel also complained that the learned trial judge did not take into account that SP4 was also a drug addict and a mental patient. However, the law is trite that there is no presumption that just because SP4 is a drug addict and a mental patient, then he is to be treated as a witness unworthy of credit and hence he should not be believed. He is entitled to credence until cogent reason for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances – see *Balasingham v. PP* [1959] 1 LNS 8; [1959] MLJ 193; *Megendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1. SP4's evidence will thus be assessed and weighed like that of any other witness and be subjected to the vagaries of cross-examination to test his veracity. Thereafter, it is the trial judge's role to make a finding on SP4's veracity with a view of whether to accept or to reject his evidence, in whole or in part, or not at all at the end of the trial, having seen and heard him. We found that the learned trial judge did not rule that SP4 is a witness unworthy of credit. We have no reason compelling enough to find otherwise.

[68] On the same footing, we found no evidence to suggest that SP4's mental condition is such that he is wholly incompetent to testify. The burden is upon the defence to provide proof of SP4's mental condition if they assert that SP4 is not legally fit to testify on account of the same – see s. 103 of the Evidence Act 1950.

[69] Learned counsel also submitted that SP4 had indeed entrapped the accused with having possession of the said drugs. Again, the burden is upon the accused to prove that he had committed the offence as a result of the said entrapment by SP4. We have scrutinised the evidence and found nothing to suggest that the accused had discharged the said burden. We have tooth-combed the entire notes of proceedings looking for evidence and reasons that would have propelled SP4 to take such drastic measures to entrap the accused to commit a capital offence. We found none. Not a single piece of evidence was adduced to support the accused's contention that he was entrapped by SP4. Equally, not a single reason was advanced by the accused why SP4 would want to entrap him. Further, it has not been shown that SP4 have an axe to grind against the accused to propel him to manufacture such evidence and testify adversely against the accused in a capital offence. There is also nothing in the evidence to suggest that SP4 had an oblique motive to fix the accused in the commission of a capital offence. Finally, there is nothing inherently improbable in the testimony of SP4 to warrant rejection. Hence, in the event, we found no merit nor substance in learned counsel's submissions that the accused was entrapped by SP4 to commit the offence.

[70] In addition, we do not think that the accused could raise this defence when it was never put to SP4 that he had entrapped the accused or that he had placed the said drugs at the front footrest of the passenger seat of the motorcar or that the said drugs were his.

Grounds (ii) And (iii) - Whether The Accused Was Only In Passive Possession Of The Said Drugs And Evidence Of Trafficking In The Said Drugs

[71] At the end of the defence case, the learned trial judge, at the risk of being repetitive, said, amongst others, at pp. 32, 33, jilid 1, RR:

> ... It was the accused own admission that he saw the two plastic bags at the footrest at the front passenger seat of the said motorcar and thought that they were baby powder milk because he saw the word 'Sustagen' written on one of the boxes. The Court was of the view that there was no affirmative evidence that the ingredient of the charge in respect of trafficking had been proved by the prosecution without the aid of the presumption or on direct evidence.

[72] Thereafter, the charge against the accused was reduced to one of mere possession under s. 6 of the DDA and punishable under s. 39A(2) of the same Act.

[73] It is most unfortunate that the learned trial judge did not assign any reason for the aforesaid finding. It appears that the said finding simply jumped out of nowhere.

[74] Hence, the learned DPP submitted that the learned trial judge had come to a wrong surmise and brought our attention to the following oft-quoted passage from the Privy Council case of *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181; [1981] 1 MLJ 64 at pp. 68, 69:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of 'traffic' and trafficking in section 2.
>
> ...
>
> ... Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus in the case of an accused caught in the act of conveying from one place to another controlled drugs in quantity much larger than is likely to be needed for his own consumption, the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible - even if there were no statutory presumption such as contained in section 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it ...

[75] It was thus the further submission of the learned DPP that the conduct of the accused in carrying or transporting the said drugs in the manner he did falls squarely within the aforesaid *dictum*. In addition, the accused did not proffer any plausible explanation for carrying or transporting the said amount of drugs.

[76] We were with the learned DPP's submissions. By all account, the amount of drugs carried or transported by the accused is huge. It is in excess of 4kg, whereas the statutory limit to trigger the presumption of trafficking is only 200g. There was no plausible explanation from the accused to account why he had carried or transported such a huge amount of drugs in the manner he did except to aver that he had no knowledge of the said drugs at the footrest of the front passenger seat of the motorcar. The said drugs were carefully concealed to avoid detection by the authorities. In addition, there is no evidence that the said drugs were for the personal consumption of the accused. It is neither the accused's defence that the said drugs were for his own consumption. It is also not in dispute that the quantity of the drugs involved is much larger than is likely to be needed for his own consumption. Hence, the inference arises from the quantity involved alone that the drugs were being carried or transported for the purpose of transferring possession of them to another person and not solely for the accused's own consumption – see *Ong Ah Chuan v. PP* (*supra*).

[77] In *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; [2006] 3 MLJ 193, the Federal Court opined that "... judging from the manner the drug was being carried, ie, in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the respondent was in fact, carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption …"

[78] Meanwhile, this court in *Wjchai Onprom v. PP* [2006] 3 CLJ 724, ruled that "… Here the appellant was caught conveying a large quantity of cannabis from Thailand to Malaysia. In view of the amount involved, it is safe to infer that the drugs were intended for a third person or persons, known or unknown. That other person or persons, may, to borrow Lord Diplock's words, be the actual customer or a distributor or another dealer. So this is not a case of mere passive possession."

[79] We found the accused in familiar territory. In all the circumstances of the case, it is reasonable and plain common sense to infer that the accused must have known of the existence of the drugs in the two plastic bags and in view of the large quantity and the manner it was packed and concealed, it could reasonably be inferred that the accused was carrying or transporting the same for the purpose of trafficking. Verily, on the facts and evidence, there is no need to even invoke the statutory presumption under s. 37(da) of the DDA to affirmatively find that the accused was trafficking in the said drugs.

Conclusion

[80] For all the reasons given, we allowed the Honourable Public Prosecutor's appeal and correspondingly dismissed the accused's appeal. The decision of the learned trial judge is set aside and substituted with a conviction under the original charge preferred against the accused. Accordingly, the accused is sentenced to death by hanging by a rope around his neck until he expired under the law.

[81] My learned brother, Justice Kamardin Hashim has gone through this judgment in draft. He is with me.

Nallini Pathmanathan JCA (dissenting):

Introduction

[82] In this case, there are two related appeals, where the accused was charged with trafficking in drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA').

[83] At the close of the defence case, the learned High Court Judge found that the accused had only committed an offence under s. 6 of the DDA, which is punishable under s. 39A(2) of the same Act. The accused was accordingly sentenced to 14 years imprisonment and ten strokes of the rotan.

[84] Both the accused and the prosecution appealed against this decision. The accused appealed both in respect of the finding of guilt under s. 6, as well as the sentence imposed pursuant to s. 39A(2) of the DDA. The prosecution appealed against the reduction of the charge to one under s. 6, maintaining that the learned judge had erred in failing to convict the accused under s. 39B of the DDA.

Salient Facts

[85] Very briefly, this is a case where the accused testified that he went to the house of SP4 (the star prosecution witness) to purchase RM100 worth of syabu. He left his home at about 7.30pm on a motorcycle. He was carrying nothing else (save for his helmet on his head and his jacket which he wore (according to him and his mother, and corroborated by the friend whom he was visiting, namely SP4).

[86] When he arrived at the premises in Taman Munsyi (not SP4's home, but a house belonging to SP4's friend) he parked his motorcycle outside the house and placed his jacket and helmet on the same. At this point, SP4 emerged from the house and handed him keys to the car parked in front of the house. The vehicle belonged to SP4's wife, SP6.

[87] SP4 asked the accused to pick up his friend by the name of 'Saintis' from a prescribed place. The accused stated that he knew 'Saintis' by that name as he had met him before at the same premises.

[88] SP4 was the 'star' prosecution witness. SP4's version of events, on the other hand, is that the accused asked to borrow his car and for that purpose came by to the house at Taman Munsyi. SP4 says that he asked a few questions and the accused then took the car. SP4 states that the accused took the car at 6.30pm. SP4's testimony on this point is contradicted by his wife, SP6, who testified that SP4 took the car out from 5 - 5.30pm, and then returned home and went out again at 8pm and returned at 8.30pm.

[89] If SP4 had given the car to the accused at 6.30pm, then he could not have returned home and had his dinner as stated by his own wife.

[90] The accused then drove the car to a point near where he was to pick up Saintis. This was between 8.40 and 8.50pm. As soon as he arrived, he realised that there was a police ambush waiting for him (pursuant to a tip-off to the raiding officer). The police raiding team found nothing on the accused's person, but found two plastic bags containing two containers sealed with sellotape, with cannabis within these containers, weighing approximately 4.8kg. The two plastic bags were on the floor well or foot rest of the passenger's seat, adjacent to the driver's seat.

[91] The accused denied all knowledge of the drugs, maintaining that they were not his, that he had not even noticed the plastic bags until he was driving mid-way to pick up Saintis, and that in any event, he was not particularly suspicious, as the two plastic bags contained boxes, one of which was marked Sustagen which he assumed to be milk powder.

[92] The accused was arrested. He pointed the police to SP4, so they went to the house where SP4 was, and found other drugs, namely syabu there. The accused was charged with trafficking. SP4 was released in respect of the drugs marked as P7A and B.

[93] SP4's evidence, which the prosecution relies upon heavily, but which the trial judge does not appear to have accepted, impliedly, is his statement that there was nothing in the car (ie, no P7A and B) when he handed over the keys to the accused. SP4 also denied all knowledge of the 4.8 odd kg of cannabis in P7A and B.

[94] SP4 however, confirms two important things: (a) the accused was not carrying anything when he turned up at the Taman Munsyi house; (b) the drugs which were found in sealed boxes and placed in plastic bags (P7A and B) did not belong to the accused.

[95] The judge found the existence of a *prima facie* case at the close of prosecution, but after hearing the defence, concluded, *inter alia*, as follows:

(a) It was reasonable for the accused to infer that the plastic bags contained milk powder, as the containers, one of which was marked Sustagen, were sealed, and then placed in containers.

(b) However, even if the accused had no *mens rea* knowledge about the drugs, he remained in 'passive' possession of the drugs, hence the reduction of the case to a charge under s. 12(2).

The Dissenting View

[96] It is evident from the foregoing, that the trial judge, who had the audio-visual advantage, believed the accused when he said that he did not know that there were 4kg of cannabis in the two plastic bags. If he did not know that the two plastic bags contained cannabis, then it follows that he could not possibly have possession of the drugs, because knowledge is not mere physical custody, but includes *mens rea* knowledge of the existence of those drugs. It would further follow, therefore, that the accused could not possibly be trafficking either.

[97] It therefore appears that the learned judge erred in law in his comprehension and application of the law on 'possession', there cannot be 'passive possession'. Possession necessarily includes knowledge of the existence of the drugs. Therefore, there should be appellate intervention only on this issue of law. It would, however, follow that the accused should be acquitted because neither possession nor trafficking was established.

[98] In the Singapore Court of Appeal case of *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72; [1949] MLJ 54, Gordon-Smith Ag. C.J stated:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise in presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

[99] The High Court in *Saad Ibrahim v. PP* [1967] 1 LNS 154; [1968] 1 MLJ 158 referred to and followed the case of *Toh Ah Loh* (above). Yong J (as he then was) distinguished between "mere possession" and "possession with *mens rea*".

[100] Mohd Saari JCA in the Court of Appeal case of *Basil Omar v. PP* [2002] 4 CLJ 418; [2003] 1 MLJ 191 explained that:

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[101] In the case of *Basil* (above), the court found from the conduct of the accused that he had knowledge that he was carrying drugs – *inter alia* he tried to avoid the police roadblock, he tried to run away and put up a struggle when caught.

[102] Gopal Sri Ram (JCA) (as he then was) in *PP v. Karim Ab Jabar* [2008] 5 CLJ 173, stated that:

> ... the essence of circumstantial evidence is not the effect of the individual strands of evidence but the combined effect of all the circumstances when taken together ... not only must the prosecution prove the *factum* of physical possession but also the knowledge of the respondent as to the nature and quality of drug possessed ... The mental element in a crime must, in the absence of an admission by the respondent, be established through circumstantial evidence from which admissible inferences may be drawn.

The Majority View

[103] My learned brothers differ with my analysis. They are of the view that the learned judge erred in his assessment of the facts. The primary reason for this is the submission by the prosecution that SP4's statement that there were no drugs, ie, that P7A and B were not in the car when he handed over the keys to the accused, was not challenged. As such that becomes, it is argued, a statement of truth. They are of the further view that the only inference that can be drawn from this is that the accused placed the drugs in the car. No other inference is either reasonable or plausible, in their view.

The Dissenting View

[104] Again, I beg to differ with my learned brothers on this point. I take the view that although not cross-examined on this sole statement, it is not possible to state with any degree of certainty that the only or sole conclusion or inference to be drawn is that the drugs were placed in the car by the accused. Other inferences are possible, namely that:

(a) SP4's statement is not without doubt, given the other parts of his evidence, which are inaccurate – in short, his credibility is in issue. SP4's evidence has to be assessed as a whole. The weight or probative value to be accorded to his evidence should not be inordinate or excessive, given the inconsistencies in his testimony, and the evidence of his wife, in relation to his habits and mental state, which show that it is unsafe to rely on his evidence alone, to convict the accused of trafficking, particularly on the basis of one unchallenged sentence of his testimony;

(b) The learned trial judge, who had the audio-visual advantage, after hearing SP4 and the defence case, concluded that it was reasonable for the accused to believe that the plastic bags contained sealed containers of milk powder, and secondly, that the accused was only in momentary or temporary possession of the car as he only drove it for 20 minutes. There is insufficient basis for an appellate court to overturn or reverse this finding of fact, based on the sole consideration that SP4 was not cross-examined on his statement to the effect that the bags, P7A and B were not in the vehicle when the keys to the vehicle were given to the accused;

(c) There was no evidence that SP4 had inspected the car prior to handing over the keys;

(d) There was no reason for the accused to "borrow" SP4's car to "carry" or "collect" such drugs when he had his own motorcycle and could easily have done so without the use of a car. For this reason, the accused's version of events to the effect that he came to purchase syabu from SP4 and was instructed/directed to fetch 'Saintis' from a designated place, appeared far more plausible and credible. This was clearly the finding/thinking of the trial judge who accepted the defence case to the effect that the accused had no knowledge of the contents of the plastic bags; and

(e) The background relating to SP4, as testified by his wife, SP6 cannot simply be ignored. It is relevant evidence by his own wife, which evidences the fact that he is a user of drugs, and he suffers from mental illness. Taken together with the accused's version of events that he went to purchase syabu from SP4 at premises other than his home, it is equally plausible that the drugs in question belonged to SP4.

[105] Given these facts, it appears to me that taken cumulatively, these matters are sufficient to cast a reasonable doubt on the veracity of the prosecution's case. In other words, it is not beyond reasonable doubt that the accused is a trafficker of the 4.8 odd kilograms of cannabis.

[106] Further, the facts of our present case can be distinguished from the Court of Appeal case of *Roslan Sabu v. PP* [2006] 3 CLJ 607; [2006] 5 MLJ 244. In that case, the court held that the accused was guilty of "wilful blindness" and had "shut his eyes to what was obvious". He "could not have missed the glaring sight of the drugs since the plastic used to wrap them was transparent, and so were the two carrier bags". The Court of Appeal in the case of *Roslan* referred to the factual matrix in two other cases (discussed below) and commented that in those cases, there was a likelihood that due to the colour of the bag or wrapper containing the drugs, the accused might not have known what the contents were.

[107] In *PP v. Tan Tatt Eek* [2005] 4 CLJ 460; [2005] 2 MLJ 685, the plastic bag containing the drugs was orange while in *Taib Mohamad v. PP* [2002] 3 CLJ 680; [2002] 3 MLJ 476, the plastic bag containing the drugs was black and the drugs were wrapped with brown tape. In the latter case, KC Vohrah JCA in the Court of Appeal held that it was not possible for the accused to know that the bag contained cannabis.

[108] In the former case, the Federal Court by a majority decision of 4:1 upheld the principle against double presumptions as laid down in *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273. The Federal Court in *Muhammad bin Hassan* had decided that to constitute 'possession' under s. 37(da) of the Act, there must be an express affirmative finding of possession and not a legal presumption of possession as provided in s. 37(d)

of the Act. After the case of *PP v. Tan Tatt Eek* [2005] 4 CLJ 460; [2005] 2 MLJ 685 settled the law on double presumptions, another panel of the Federal Court (only three members instead of five) decided that the High Court had erred in finding the accused guilty of trafficking in dangerous drugs, and affirmed the decision of the Court of Appeal in convicting the accused on a reduced charge of possession.

[109] In addition, in the case of *Roslan* (above), James Foong JCA (as he then was) stated":

> There must be direct proof or inference that the accused knew what he was carrying was illicit drug ... To successfully infer such knowledge in this kind of situation, there must only be one exclusive inference to this fact to the exclusion of other possibilities.

[110] In the present case, there are multiple inferences which may be drawn, as postulated in para. 23 above.

[111] It is trite in criminal law that an accused should be given the benefit of the doubt. As far back as 1948, Spenser Wilkinson J in the Court of Appeal case of *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948] MLJ Supp 105] stated:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

[112] This sentiment was reiterated in 2009 by KN Segara JCA in the case of *Sridhar Arunasalam v. PP* [2009] 6 CLJ 595, although His Lordship did not refer to the case of *Tai Chai Keh*. His Lordship went on further to say that the prosecution must prove its case without relying on any adverse inference against the accused:

> .... the well-settled principles in criminal law that an accused must be accorded the benefit of any inference favourable to him from a given set of facts must be strictly adhered to and the prosecution cannot shirk its responsibility to prove its case beyond a reasonable doubt by invoking any adverse inferences from the said facts, to establish any ingredient of the offence.

[113] For the reasons above, it is my view that this is an unsafe conviction and the accused should therefore be acquitted.

[114] I do not agree that the finding of the learned trial judge of guilt under s. 6 of the DDA should be enhanced to one of guilt under s. 39B of the DDA. For these reasons, I am constrained to dissent from the majority. Accordingly, Appeal No. J-05(SH)-34-01/2016 is allowed and Appeal No. J-05(SH)-36-01/2016 is dismissed.